No. 02-1480

(2)

Supreme Court, U.S.
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In the Supreme Court of the United States

JOSEPH F. ISTVANIK,

Petitioner,

v.

OFFICER MICHAEL ROGGE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

This case presents an application of this Court's two-pronged qualified immunity test detailed in Saucier v. Katz, 533 U.S. 191, 121 S. Ct. 2151 (2001), which states, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals." Saucier, at 200.

The three questions presented by the petitioner encompass two issues:

1) Whether the district court and Court of Appeals committed an error of law by finding and affirming, respectively, that the respondent was entitled to qualified immunity regarding the plaintiff's claim under 42 U.S.C. § 1983, because the law establishing the asserted right was not clearly established, even on a general level.

2) Whether this Court need address whether and to what extent a circuit court should consider decisions from other circuits in deciding whether a particular right is "clearly established."

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I. FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

The plaintiff filed a civil action under 42 U.S.C. § 1983, based upon events that occurred after being stopped for drunk driving. (App. at 1, 3) On September 8, 1997, the plaintiff was in Lower Gwynedd Township, Pennsylvania. He was driving erratically, down the center of the road in the turning lane at a high rate of speed, while being pursued by police officers who had their lights and sirens activated. (Boehs testimony at 18-22.) The plaintiff repeatedly ignored attempts to pull him over, and the officers were finally forced to box him in with their vehicles in order to get him to stop. (10/10/00, at 6-8.) The plaintiff leapt from his car, pointed to his Department of Defense parking sticker, and repeatedly shouted "I'm D.O.D., I'm D.O.D." (Boehs testimony at 23.) The plaintiff testified that he hoped that the sticker would gain him some leniency from the officers. (10/5/00 at 17.)

The plaintiff displayed clear signs of intoxication. He had slurred speech, wavering gait, and a strong odor of alcohol on his breath. (Id.) The plaintiff failed the field sobriety test, his preliminary breath test revealing a blood alcohol level of 0.16-well above the legal limit of 0.10. (Id., at 8-9) He himself conceded that the officers has probable cause to arrest the plaintiff on charges of driving while intoxicated.

After refusing to give consent to a blood-alcohol test at North Penn Hospital, the plaintiff was taken to Montgomery Township Police Department to be held until his intoxication abated. (Id., at 10-12.) The plaintiff was detained at the Montgomery Township Department because the police were unable to contact someone to pick up the plaintiff, and Lower Gwynedd cannot hold someone in their

holding facilities without also putting an additional officer on duty. Montgomery Township can accommodate an extra detainee. (Id., at 12-13.)

The plaintiff's bizarre and uncooperative behavior continued during the three hours he was held at the Montgomery Township facility. He took his shirt off and tied it around the bars of the cell, which the officers had to retrieve. (10/6/00 at 46.) He paced repeatedly in his cell, like "a large cat in a cage pacing back and forth, nervous, uneasy..." (Id., at 46.) He repeatedly attempted to evade the surveillance on the cell by moving to areas of the cell which the cameras did not cover. (Id., at 45-48.) After repeatedly ignoring the requests by Montgomery Township officials that he cooperate, the Lower Gwynedd police were asked to retake custody of him. (Id., at 47.)

Back at the Lower Gwynedd station, the plaintiff continued his uncooperative behavior. The plaintiff took his shirt off and covered the camera with it. (10/10/00 at 20; 75-76.) He hid from the camera and banged his head against the door to the cell:

> Q: Now, you heard a banging. What did you do when you hear that banging?
>
> A: Returned back to the cell area...I observed through the window again, I could see Mr. Istvanik banging his head methodically on the door right below the window...he was just leaning against the door banging it.

(Id., 77.) The plaintiff was told that he had to remain within the view of the camera, but repeatedly ignored that warning.

Because of the danger which the plaintiff presented to himself, one of his hands was handcuffed to the leg of the bunk in his cell. This was done in order to keep him a position where he could be observed, so that he did not harm himself. (10/10/00 at 23-24.)

> Q: It's noted on the log that at 1:43 there's a decision made to use one cuff to restrain him. Why is that?
>
> A: [W]e knew we had to confine him to an area where we could see him and where we believed he couldn't do any harm to himself as far as banging himself anymore.
>
> Q: Did he ever say he had to use the bathroom at any time?
>
> A: No, he did not.
>
> Q: Could he have used the bathroom if he had asked?
>
> A: If he had asked, I would have unhandcuffed him and he could have gone to use the bathroom. And he probably would have been given another opportunity to lay on the bed and go to sleep.

(Id., at 23.) Instead of simply sitting and letting the effects of the alcohol wear off, the plaintiff decided to crawl under the bunk, out of range of the camera. (Id., at 24-25.) He was again warned by Officer Rogge to remain visible by the

camera and was specifically told that he could not lie under the bunk. After Officer Rogge left the cell, the plaintiff went under the bunk yet again. He began to repeatedly bang his head against the underside of the bunk. (Id.)

Officer Rogge and another officer, Officer Richard Lawn, reentered the cell and extracted the plaintiff from the underside of the cot. (Id., at 26.) He was seated with his back to the cot and "double cuffed" to the cot leg. (Id.) This is a procedure where two sets of handcuffs are used, one set attached to each wrist with the two sets then attached together behind the cot leg. This gives the prisoner twice as much room to move as would be the case if only one set of cuffs were used. (Id.)

The plaintiff instituted suit against Officer Rogge, Officer Lawn, as well as Lower Gwynedd Township, its police chief and its township manager. The plaintiff claimed that this handcuffing was done in such a manner and to such an extent that is constituted excessive force.

The defendant filed a motion to dismiss under Rule 12(b)(6), arguing that he was entitled to qualified immunity, and therefore, had the right not to stand trial and be free from the other burdens of litigation. This motion was denied. (App., at 4).

Trial was held before the Honorable R. Barclay Surrick and a jury, and the jury returned a verdict in favor of the plaintiff in the amount of $55,000.00. (App., at 9) Only Officer Rogge was found to be liable. In the Defendant's

post-trial motion under Rule 50(b), he asserted, inter alia, that the trial court erred in not granting him qualified immunity.[1]

The Court held that qualified immunity should have been granted, following the then-recent decision of this Court in Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001). (App., at 26-38)

The district court presumed that the facts alleged by the plaintiff could amount to a violation of a constitutional right, because the jury found for the plaintiff. However, the Court also concluded that the right to be free of overly-tight handcuffs was not so well-established that a reasonable officer in Officer Rogge's position would have known his conduct was unlawful. (App., at 30-37.) As such, he was entitled to qualified immunity. The district court thus granted the Rule 50(b) motion. (App., at 38.)

The plaintiff appealed to the Third Circuit Court of Appeals at 01-3395, asserting, inter alia, that the district court's analysis under Saucier was improperly done[2]. The

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[1] One of the arguments which was not addressed by Judge Surrick was whether or not the verdict against Officer Rogge for the excessive use of force was against the weight of the evidence. The excessive force claim was based exclusively on the argument that the cuffs were too tight, but the evidence at trial clearly showed that the cuffs were put on the plaintiff by co-defendant Officer Richard Lawn, not by Officer Rogge. The jury found in favor of Officer Lawn and the plaintiff did not appeal that finding.

[2] Officer Rogge also filed a protective appeal at 01-3536, arguing that if the Court found the district court's decision on qualified immunity issue in favor of the plaintiff, that the Court erred in not

Court of Appeals reviewed the district court's opinion, and concluded, "[w]e find no error in the district court's Saucier analysis."(App., at 6a)

Since there was no merit to any of the issues raised by the plaintiff, the Court affirmed "the district court's grant of judgment as a matter law to Rogge."(App., at 9a.) The petition to this Court for a writ of certiorari followed.

II. ARGUMENT AGAINST ISSUING THE WRIT OF CERTIORARI

A. The Considerations Preferred By This Court When Granting Certiorari Are Not Present Here

Rule 10 of the Supreme Court Rules details the reasons which this Court considers compelling when determining whether to exercise its prerogative and issue a writ of certiorari. Those reasons include when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(a), (c).

None of the considerations of Rule 10 are present in this petition for a writ of certiorari. The plaintiff's claim is, at heart, a request for this Court act as an error correcting court, and to review what the plaintiff sees as the

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using the more generous "shock the conscience" standard of the Fourteenth Amendment.

misapplication of the two-part qualified-immunity test established in Saucier[3]. The plaintiff also asks this Court to resolve the split among the circuit courts as to when and to what extent case law from other circuits can be used to find that the law has been "clearly established." Neither of these reasons is an appropriate basis for granting the petition for the writ of certiorari.

Regarding the first issue, Rule 10 notes that this Court is loathe to grant certiorari simply to address what the petitioner perceives as an improper application of a properly stated rule. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. The opinion by Judge McKee of the Third Circuit Court of Appeals shows that the court appropriately applied of the proper rule of law regarding qualified immunity.

As for the second issue, this Court should not issue a writ of certiorari because there is a split among the circuits regarding the use of case law from outside the circuit in determining whether a particular point of law was "clearly established." The conflict that exists has no relevance to this case. Both the district court and Court of Appeals examined the law in the broadest possible terms, examining both district court and court of appeals cases from other circuits in determining that the right has not been "clearly established."

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[3] Both question 1 and 2 of the "Questions Presented" by the plaintiff appear to address the same issue; one asking whether the right was clearly established, the other asking whether the Court of Appeals erred in finding that it was not.

Had these courts used a more narrow standard, qualified immunity would still have been appropriate.

As such, if this Court were to find the issue of how broadly the law should be canvassed to be a question worthy of eventual review by this Court, it is respectfully suggested that certiorari be withheld until such time as the inquiry would be determinative. The circuits may be split on their approach to this issue, but Officer Rogge is entitled to qualified immunity regardless of which approach is used. Examining the issue in this case would merely be an academic exercise, and the defendant respectfully suggests that if this Court is to address this issue, it should do so where this Court's analysis has a substantive, if not determinative, effect on the case.

As such, the petition for writ of certiorari should be denied.

B. The Trial Court Properly Applied the Supreme Court's *Saucier* Decision, and Found That Officer Rogge Was Entitled to Qualified Immunity.

The lower courts correctly held that Officer Rogge was entitled to qualified immunity. Government officials exercising discretionary functions have qualified immunity from suits seeking damages under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed. 2d 396, 102 S. Ct. 2727 (1982).

If the law does not put the officer on notice that his actions would be clearly unlawful, qualified immunity must be

granted. Saucier, 533 U.S. at 202. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 271, 106 S. Ct. 1092 (1986).

Applying *Saucier*

The Court of Appeals and the district court before it, assumed that the first step in the Saucier analysis was foreclosed by the fact that the jury found for the plaintiff. The plaintiff's argument for denying Officer Rogge qualified immunity-based on the claim of excessively tight handcuffs while the plaintiff was double-cuffed to the cell bunk-fails to account for the fact that Officer Rogge did not actually put the handcuffs on the plaintiff.[4]

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[4] While Officer Rogge could not recall who handcuffed the plaintiff, Officer Lawn and the plaintiff himself testified that it was Officer Lawn who put the cuffs on the plaintiff.
(10/10/00 at 33; 81.)

Q: Mr. Istvanik, when Officer Lawn applied the cuffs to your right wrist, can you describe how he applied the handcuff?

A: The only thing that I can describe, he takes them, he squeezes them of my left wrist. I could hear them clicking, click, click, click, click, click. And he squeezed them on the right wrist. And I told him, I said, "These are tough, these are tight," and they left.

(10/5/00 at 38-39.) Officer Lawn testified, however, that the plaintiff did not state that the cuffs were tight. (Id. at 83.)

It belies logic to suggest that the jury's verdict can foreclose the question of whether Officer Rogge can be found to have used excessive force in using tight handcuffs when it was Officer Lawn who actually put them on. Nevertheless, even if it is assumed for the sake of argument that a constitutional right would have been violated on the facts, qualified immunity was still appropriate, because there was no clearly established right.

There Was No Clearly Established Right

The second step of the Saucier test asks whether the right in question was clearly established. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." Saucier, at 201.

It is not enough that the right alleged to be violated was established as a general proposition. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." Saucier, at 202, quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987).

The analysis of whether the right was clearly established must be done from the perspective of the officer on the scene. Graham v. Conner, 490 U.S. 386, 396, 109 S.Ct. 1865 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. "With respect to a claim of excessive force,

the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers'...violates the Fourth Amendment." Id., internal citation omitted.

The Third Circuit Court of Appeals has described the second prong of the Saucier test as asking, "in the factual scenario established by the plaintiff, would a reasonable officer have understood that his actions were prohibited? The focus in this step is solely upon the law. If it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity." Bennett v. Murphy, 274 F.3d 133, 136-137 (3d Cir. 2001).

Thus, under the particular facts of this case, Judge Surrick in the district court and the Court of Appeals in review had to decide whether a reasonable officer would have understood that double-cuffing an intoxicated and uncooperative prisoner to the leg of his cot, so as to prevent him from evading the view of the cell camera, harming himself, and possibly aspirating on his own vomit, after attempting other, less forceful methods of achieving these goals, was prohibited.

Examining the state of the law at the time of the plaintiff's arrest, it is apparent that there was no settled law in this area, as Judge Surrick surmised. Whereas the right must be defined at the appropriate level of specificity, the district court noted "that the law in this area is not clearly established even on a general level."(Opinion at 20.)

In evaluating this prong, Judge Surrick surveyed court decisions in the Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, and the Eastern District of Pennsylvania, District of Maine, and Eastern District of Virginia. The Court

concluded that some of these decision found excessively tight handcuffs to be supportive of an excessive force claim, some found that it does not, and some were in between.

The Court cited to Glenn v. City of Tyler, 242 F.3d 307 (5th Cir. 2001) for the proposition that "handcuffing too tightly, without more, does not constitute excessive force," and quoted the Tenth Circuit Court of Appeals decision in Hannula v. City of Lakewood, 907 F.2d 129 (10th Cir. 1990) for the proposition that "while loosening tight handcuffs may be the most compassionate action, the failure to do so does not rise to a clearly established constitutional violation." Hannula, 907 F.2d at 132.

Judge Surrick also noted three cases in which qualified immunity was granted to police officers where tight handcuffing was involved, *citing* Greiner v. City of Champlin, 27 F.3d 1346 (8th Cir. 1994); Hoffa v. Township of Colebrookdale, 1999 WL 55171, 1999 U.S. Dist. LEXIS 381 (E.D. Pa. 1999); and Cooper v. City of Virginia Beach, 817 F. Supp. 1310 (E.D. Va. 1993).

The underlying decision which was affirmed by the Eighth Circuit Court of Appeals in Greiner was cited in Nelson v. Mattern, 844 F. Supp. 216 (E.D. Pa. 1994) was cited to illustrate "the fact-specific nature of the excessive force analysis." The Nelson Court characterized the Greiner decision as holding "that tight handcuffs and pushing suspects was justified where suspects were intoxicated and resisting arrest." Nelson, 844 F. Supp., at 222, *citing*, Greiner v. City of Champlin, 816 F. Supp. 528, 542 (D. Minn., 1993).

Intermediate Positions

Other cases have taken an intermediate position on the question of whether an excessive force claim can arise from tight handcuffs. In Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993), the Sixth Circuit Court of Appeals held that an excessive use of force claim could be premised on the officer handcuffing the prisoner if: first, the officer knew the prisoner had an injury; and second, if the officer also believed that the prisoner posed no threat. Walton, at 1342.

If Walton were applied to these facts, no excessive force claim would exist because Officer Rogge testified that he did not know the exact nature of the plaintiff's alleged disability, and specifically, did not know that they involved the plaintiff's arms, nor was he aware of any disability related to the plaintiff's back:

Q: You knew from what he told you at the arrest that he had tendonitis, bursitis and some type of arthritic condition.

A: I knew there was some conditions, yes, I did.

Q: ***And you knew they involved his upper extremities, correct?***

A: ***I wasn't exactly sure where they related to.***

* * *

Q: And you also were aware that Mr. Istvanik had a lower back problem?

A: I wasn't aware of that.

Q: You were not aware of that.

A: To the best of my recollection.

(10/10/00 at 55-56) Also, the plaintiff also continued to be a threat to himself.

Both Officer Rogge and Officer Lawn testified that it is dangerous for the plaintiff to be hiding from the cameras by going under the bunk in the cell. Officer Rogge testified why the plaintiff was not permitted to evade the cameras: "I don't know what he's doing underneath there. He could be doing any number of things to harm himself. And I need to see him to take care of him."(10/10/00 at 25)

Officer Lawn echoed that same concern:

Q: Is there a concern that if the person, and out of concern that if the person hiding under the bunk is intoxicated?

A: Sure. Drunk people sometimes throw up. If he went under there he could asphyxiate on his vomit. And we wouldn't have been able to know what was going on under there.

(Id. at 105-106.) Finally, even the plaintiff's own expert, John G. Peters, agreed that a prisoner who continued to crawl underneath the bunk posed a threat to himself.

Q: How about if you're monitoring somebody and the one handcuff is

applied and they crawl under the bunk, what risk is there if an intoxicated person is laying flat on their back, under the bunk and you can't see them?

A: There's a risk that the person could probably vomit and possibly asphyxiate on that...

(10/4/00 at 149.) Mr. Peters also testified that the configuration which Officers Rogge and Lawn used in securing the plaintiff afforded him greater comfort.

Q: Do you agree that the use of two handcuffs was actually to afford Mr. Istvanik greater comfort because his arms would not be pulled so tightly behind his back?

A: As a general rule the use of two handcuffs do that. They do allow the arms to be further apart.

Q: And that's what was done in this case?

A: That's what was done in this case, it's my understanding, yes.

(Id., at 152.) So, had Walton been the applicable law, no violation would exist, based on an individualized assessment of the facts of this case. Not only was Officer Rogge unaware of the plaintiff's alleged disabilities, but the plaintiff also continued to represent a danger, necessitating that he be secure.

The Eleventh Circuit case of Rodriguez v. Farrell, 280 F.3d 1341 (11th Cir. 2002) presents another intermediate view of the question of excessive force handcuffing and also displays the extent to which the law in this area remains to this day, not "clearly established." In Rodriguez, after a traffic stop, two police officers arrested the plaintiff pursuant to a valid warrant which, it turned out, was issued for a different individual.

In the course of making the arrest, the plaintiff's arm was twisted behind his back and jerked up to his shoulder. Rodriguez, 280 F.3d at 1351. The plaintiff screamed. Unbeknownst to the arresting officer, the plaintiff had recently undergone significant orthopedic shoulder surgery. Id. As a result of the handcuffing, the plaintiff's internal surgical hardware was loosened, and a key bone fragment was displaced. Id. Over twenty-five surgeries followed in an attempt to correct the problem, which were ultimately unsuccessful and resulted in the plaintiff's arm being amputated below the elbow. Id.

In reversing the district court's denial of summary judgment, the Court first noted that "[p]ainful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." Id., at 1351, *citing*, Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000); Brissett v. Paul, 141 F.3d 1157 (4th 1998) (table); Foster v. Metropolitan Airports Comm'n, 914 F.2d 1076 (8th Cir. 1990); Martin v. Gentile, 849 F.2d 863 (4th Cir. 1988); Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982).

The Court then recognized that the plaintiff's surgery changed the situation, somewhat, by virtue of the negative consequences. "This case is different from Nolin because [plaintiff's] earlier surgery made what otherwise would have

been a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results." Rodriguez, at 1351.

This distinction, and the devastating injuries which resulted, was found by the Court to be legally irrelevant for purposes of determining whether excessive force was used:

> [N]o evidence has been presented that [the arresting officer] knew of plaintiff's recent elbow surgery or, more importantly, knew that handcuffing plaintiff would seriously aggravate plaintiff's preexisting condition. We do no use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time.

Id., at 1351-1353, (footnote omitted.) Likewise, in this case, there was no evidence or testimony presented which showed that Officer Rogge knew of the exact nature of the plaintiff's ailments or, more importantly, that he knew that the double cuffing necessary to secure and protect the plaintiff could aggravate these ailments.

Other courts have taken this intermediate position, that handcuffing could possibly constitute excessive force, depending upon the knowledge of the officer or the extent of injury.

In Carter v. Morris, 164 F.3d 215 (4th Cir. 1999), the court stated that the plaintiff's excessive force claim based on tight handcuffing was "so insubstantial that it cannot as a matter of law support her claim under the Fourth Amendment...or the Fourteenth." Carter, 164 F.3d at 219, n3 (internal citations omitted); see, also, White v. Maryland Transportation Auth., 151 F. Supp. 2d 651, 657 (D.Md. 2001). The Court in Carter cited, as support, Martin v. Gentile, supra., and Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997). In Riley, as in Carter, the court took an intermediate position and affirmed the grant of qualified immunity where the painful handcuffing claim produced no injury. Riley, at 1167.

In Gonzalez v. Benito, 1994 U.S. App. LEXIS 25609 (1st Cir. 1994) (unpub.), the court held that "tight handcuffs standing alone are not enough to proceed to trial on a constitutional claim." Gonzalez at *4. In Gold v. City of Miami, 121 F.3d 1442 (11th Cir. 1997), the Eleventh Circuit Court of Appeals also affirmed the granting of qualified immunity, even though the plaintiff experienced pain and minor injuries. Gold, at 1446-1447. The Court stated that the circumstances would not "inevitably lead" an officer to conclude that his use force was unlawful. Id.

Distinguishable Cases

The district court's opinion cites a number of cases which support the view that a constitutional claim can arise from handcuffing. The plaintiff, in his petition, highlights a number of those cases, and other cases which he believes supports the conclusion that the law was well settled. However, upon closer examination, some of those cases do not really provide the support for his position that the plaintiff was suggesting.

For example, the plaintiff cites to Williams v. Benjamin, 77 F.3d 756 (4th Cir. 1996) and Landman v. Royster, 333 F. Supp. 621 (E.D.Va. 1971), for the contention that "handcuffing an inmate in his cell to restrain or control misbehavior was unconstitutionally excessive." (Petition at 13.) However, in both of these cases, the use of restraints was not done to protect the detainee from harming himself, as was the case here, but was used as corporal punishment for misbehavior. Williams, at 765-766; Landman at 647-648. The use of handcuffs in this case was not done to punish the plaintiff, but to protect him.

Similarly, in Casaburro v. Guiliani, 986 F. Supp. 176 (S.D.N.Y. 1997), the plaintiff alleged that the police improperly used handcuffs on him as a punishment. Casaburro, at 178-179. The Court, examining the claim under the Eighth Amendment, specifically addressed the fact that there was no need to handcuff the plaintiff in his cell. Id. Here, the plaintiff continued to present a danger to himself, necessitating restraint. Indeed, not only did Officers Rogge and Lawn not use the handcuffs as a form of punishment, but they actually used the double-cuff technique specifically because it allowed for additional comfort for the plaintiff.

Finally, the plaintiff attempts to analogize this case to Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508 (2002). The plaintiff views the only difference between Hope and this case is that in Hope, the plaintiff was attached to a hitching post. (Petition, at 11, n10.) In fact, in Hope, this Court's determination was made under the Eighth Amendment and the question before the Court was whether the actions taken against the plaintiff, as punishment for previous transgressions, was cruel and unusual punishment. In this case, the handcuffs were not used as a punitive measure.

The plaintiff provided a quotation from Hope in his footnote 10. Filling in the ellipses, this Court indicated, "Nor, ***for the purpose of providing fair notice to reasonable officers administering punishment for past conduct***, is there any reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for a prolonged period and handcuffing him to a hitching post for seven hours." Hope, at 122 S.Ct. at 2517, emphasis supplied. Since the double handcuffing performed in this case was not done by the officers "administering punishment for past conduct," Hope is clearly distinguishable.

Conclusion

All the cases examined by the district court as well as those addressed here show that there was great disagreement as to whether, and to what extent, an excessive force claim can be based on handcuffing. The Court of Appeals affirmed that view:

> We find no error in the district court's Saucier analysis. Quite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving.

(Opinion at 6a.)

The plaintiff seems to suggest that the court should have evaluated these conflicting cases and made a determination as to what the law should be, or to declare the right "clearly established" if some circuit courts find that an

excessive force claim can arise from tight handcuffing. The court's role under Saucier, however, is only to determine if the law was "clearly established.". Where, as here, the various courts' resolutions to this issue have not only fallen at both ends of the question, but also at intermediate points as well, the right is not "clearly established."

While the plaintiff can point to case law which characterizes tight handcuffing as a constitutional violation, the fact that other cases hold otherwise or come to some intermediate position, is important because this lack of uniformity, is the key to the decision, as it is proof that the right has yet to be clearly established.

The question under the second prong of the Saucier test does not ask what the law should be, but whether it has been clearly established. And here, the law was not clearly established.

As the district court noted, this is one of the areas in which qualified immunity is specifically designed to apply:

> From a review of the case law, it is clear that tight handcuffing is a perfect example of the Supreme Court's warning in Saucier v. Katz that "Graham['s objective reasonableness standard] does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." Saucier, 121 S. Ct. at 2158. The doctrine of qualified immunity exists to protect law enforcement officials from exactly the type of muddied legal waters apparent in the case law concerning the use of tight handcuffs.

(Opinion at 21.) As Judge Surrick concluded, under all of the facts in this case, "[t]o conclude that Officer Rogge was plainly incompetent or that he knowingly violated the law is simply not justified in the totality of this case."(Opinion at 25.)

Because the question of whether tight handcuffing as a potential basis for an excessive force claim was not, and still is not, clearly established, a reasonable officer in Officer Rogge's position could have reasonably believed that the actions that he took in securing the plaintiff was permissible and lawful. Since that is the case, there was no error in the trial court's opinion granting Officer Rogge qualified immunity.

C. This Court Needs Not Address The Split Among The Circuits On Whether To Examine Law From Outside The Circuit When Deciding Whether The Law Has Been Clearly Established With This Case, Because The Result Is The Same No Matter What Standard Is Applied.

The other issue presented by the plaintiff in requesting a writ of certiorari is what weight is to be given to cases arising outside the circuit when there is no controlling authority in the circuit in which the case arose. The courts of appeals have developed a number of approaches to answer this question. In Johnson v. Horn, 150 F.3d 276 (3d Cir. 1998), *overruled, in part, on other grounds, in* DeHart v. Horn, 227 F.3d 47, 54-55 (3d Cir. 2000), the Third Circuit noted that "the courts of appeals are divided as to whether, and to what extent, out-of-circuit decisions may be considered

in determining whether the law was clearly established." Johnson, at 286. Three approaches were detailed:

1) Decisions from other courts of appeals may be considered. This approach is followed by the Tenth, Second, Eighth, Seventh, and Ninth circuits. Id., at 286, n6, citing, Baptiste v. J.C. Penney Co., 147 F.3d 1252 (10th Cir. 1998); Varrone v. Bilotti, 123 F.3d 75, 78 (2d Cir. 1997); Norfleet ex rel. Norfleet v. Arkansas Dep't of Human Servs., 989 F.2d 289, 291 (8th Cir. 1993). Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431 (7th Cir. 1989); Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989), respectively.

2) Decisions from other circuits may only considered in exceptional circumstances. This approach is followed by the Fourth and Sixth circuits. Johnson, at 286, citing, Wilson v. Layne, 141 F.3d 111, 117 (4th Cir. 1998) (en banc); Cope v. Heltsley, 128 F.3d 452, 459 (6th Cir. 1997) (en banc), respectively.

3) Decisions from other circuits may never be considered. This approach is followed by the Eleventh and Fifth circuits. Johnson, at 286, citing, Jenkins ex rel. Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 823 & n.4 (11th Cir.), cert. denied sub nom.

Jenkins ex rel. Hall v. Herring, 139 L. Ed. 2d 315, 118 S. Ct. 412 (1997); Brady v. Fort Bend County, 58 F.3d 173, 175 (5th Cir. 1995), respectively.

In this case, the district court examined the state of the law as it exists in other circuits. The Third Circuit Court of Appeals affirmed and approved that decision. Thus, the Third Circuit can safely be placed in the first category.

In the plaintiff's petition to this Court, the apparent split in the circuits is grouped differently.

The broadest interpretation is credited to the Eighth and Ninth Circuits, which would consider all case law, citing Hayes v. Long, 72 F.3d 70, 73-74 (8th 1995) and Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988). The Second, Third, and Seventh Circuits, will look to decisions by the district courts, but will not permit them to establish the law, citing Jermosen v. Smith, 945 F.2d 547, 551 (2d Cir. 1991); Threadgill v. Armstrong World Indus. Inc., 928 F.2d 1366, 1371 (3d Cir. 1991); and Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995).

A narrower approach is exemplified by the Fourth and Eleventh Circuits, which allow decisions by this Court, the respective circuit courts, and the state's highest court to be considered, citing Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998), cert. denied, 531 U.S. 1076 (2001) (en banc); Jenkins, supra. Finally, the strictest approach is followed by the Sixth Circuit, which considers only decisions by this Court, the Sixth Circuit Court of Appeals and the district court itself, citing Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1171 (6th Cir. 1988).

Regardless of precisely how the various approaches are categorized and classified, these decisions form a continuum with a broad examination of all case law at one end, and a very narrow examination at the other. The precise classification is unimportant in this particular case because the district court examined the law using the very broadest standard-examining circuit and district court cases from out of the circuit-and yet found that the law was not clearly established. If the law is examined under any of the narrower standards, regardless of whether the Johnson classification or the plaintiff's classification is used, the conclusion is the same: Officer Rogge is entitled to qualified immunity.

Under different facts, this split could pose an interesting question of law for this Court to consider. However, under the facts of this case, it would merely be an academic exercise, as Officer Rogge is entitled to qualified immunity regardless of the standard applied.

The broadest approach allows for the consideration of other circuits' decisions, including district court cases. This was the standard employed by the district court in this case. Under that approach, Officer Rogge was found to be entitled to qualified immunity because the law in this area is not clearly defined, even on a general level, as the previous section of this opposition details.

Had the court favored a narrower approach, Officer Rogge would again be entitled to qualified immunity. For example, under the Sixth Circuit's view as detailed in Cope, supra, case law from outside the circuit can embody clearly established law, but "such decisions must both point unmistakenly to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his

conduct was unconstitutional." Cope at 459, n4. Given the conflicting nature of the authorities in this case, they do not "point unmistakenly to the unconstitutionality" of the use of handcuffs to restrain the plaintiff in this case. That, coupled with a lack of direct precedent by the Third Circuit or this Court, would require a finding that Officer Rogge is entitled to qualified immunity under this narrower approach.

Finally, had the narrowest approach been employed, which only finds a right to be clearly established if it is based on precedent from this Court, or the particular circuit's court of appeals, Officer Rogge would be entitled to qualified immunity. There is no precedent from this Court or the Third Circuit Court of Appeals on whether or to what extent an excessive force claim can stem from the use of a double set of handcuffs to restrain a drunken and uncooperative detainee for his own protection. Since that is the case, under the narrowest approach, the law is not clearly established, and the officer is entitled to qualified immunity.

These approaches differ, but regardless of how narrow or broad the approach, the result is the same under the particular facts of this case-Officer Rogge is entitled to qualified immunity.

In this case, the district court and the Third Circuit Court of Appeals examined this case under the broadest possible standard. Cases were considered even though they were from different circuits, and even though they were district court cases. The court concluded that the law had not been clearly established. Under a more strict standard, one that primarily or exclusively looked to that circuit's jurisprudence, the result would be even less in doubt, because there was no Third Circuit case on this issue.

This Court should deny the plaintiff's petition for a writ of certiorari because this Court's examination of the question would necessarily be an academic one. If this Court were inclined to examine this issue, it would be better suited to wait, and do so in a case where the degree of scrutiny that an out-of-circuit case receives might make a difference in whether immunity is granted. The Third Circuit Court of Appeals in Johnson refused to adopt any particular approach, because under each of them, the result was the same. After noting that the courts held divergent opinions regarding the use of out-of-circuit decisions, the Court stated, "[w]e need not answer this difficult question, because we conclude that, under any standard, the law entitling the Inmates to a kosher diet was not clearly established when [defendants] refused the Inmates' request for kosher meals." Johnson, at 286.

Because Officer Rogge will be entitled to qualified immunity regardless of how the question is answered, he should not be forced to continue this case in order for the question to result in, essentially, an advisory opinion by this Court. Cf. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566, 97 S.Ct. 2849 (1977) (declining exercise of jurisdiction where adequate and independent state grounds existed because, in part, "if the same judgment would be rendered by the state court, after we corrected its view of federal law, our review could amount to nothing more than an advisory opinion.")

III. CONCLUSION

For all of the foregoing reasons, this Court is respectfully requested to deny the plaintiff's Petition for Writ of Certiorari.

Respectfully Submitted,

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